

SUPREME COURT OF NIGERIA
17TH JUNE, 2011. SC.160/2003
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F.
TABAI, J. A. FABIYI, B. RHODES-VIVOUR, JJSC

A.G. FERRERO & CO. LTD. APPELLANT
AND
HENKEL CHEMICALS (NIG.) LTD RESPONDENT

COMMERCIAL LAW - Unlawful withholding of money - Remedy applicable - A party who unlawfully withholds another's money - Is liable to pay compensation by way of interest (H1)

CONTRACTS - Terms - Binding nature - Parties are bound by the terms of the contract - And court must give effect to same - Award of the 25% interest rate in this instance is wrong (H2)

FACTS

In 1987, the parties entered into a contract under which appellant was to construct for respondent a soap and detergent factory as well as office building in Kaduna at the contract sum of N3,854,938.10 (Three Million, Eight Hundred and Fifty Four Thousand Nine Hundred and Thirty Eight Naira, Ten Kobo). It was part of the agreement that the sum contained in any certificate of payment issued by respondent to appellant fell due for payment within 21 days of the issuance of such certificate. It was however not a term in the agreement that in event of default of payment by respondent as stipulated, it would be liable to pay in addition 25% of the sum contained in the certificate issued by Architects appointed by it.

The sum which fell due for payment as contained in respondent's Architect Certificate No. 18 was N449,474.45. Respondent defaulted in paying the said sum as agreed. Consequently, appellant filed this action at the High Court of Kaduna State, Kaduna claiming, in addition 25% of the above stated sum in certificate No. 18. The trial court granted the claim including the 25% which it described as consequential damages. Aggrieved, respondent appealed to Court of Appeal, Kaduna. The court reversed the decision of the trial court on this issue of prejudgment interest and set aside same. Dissatisfied,

appellant has appealed to Supreme Court.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in setting aside the trial court's judgment awarding a pre-judgment interest rate of 25% per annum on the outstanding judgment sum of N449, 474.45 from December 29th, 1989 to June 16, 2000.

HELD (Unanimously dismissing the appeal per **TABAI JSC**)

Unlawful withholding of money - Remedy applicable

1. The Court below referred to a number of other authorities. On this sole issue of pre-judgment interest, learned counsel for the parties cited a number of authorities including EKWUNIFE's case. I have read the authorities and there is no doubt that NIGERIAN GENERAL SUPERINTENDENCE CO. LTD Vs NIGERIA PORTS AUTHORITY and ADEYEMI Vs LAN & BAKER (NIG) LTD cited by the Appellant were decided on the principle that in purely commercial transactions, a party who holds on to the money of another for a long time without any justification and thus deprives that other of the use of such funds for the period should be liable to pay compensation by way of interests. NIGERIA GENERAL SUPERINTENDENCE CO. LTD Vs. NIGERIA PORTS AUTHORITY went a step further to decide that even where interest is not claimed in the writ, the court can, in appropriate cases, award interest in the form of consequential order. (p. 1700 D)

CONTRACTS - Terms - Binding nature

2. The question now is whether the principle in these cases adequately applies to the facts and circumstances of this case. The principle in the two cases pertains to normal commercial transactions without reference to any particular agreement, oral or documentary, in contradistinction to the instant case wherein the parties agreed to and are bound by a written contractual agreement. Can any of the parties be at liberty to read into such a written contract a term which is not embodied in it? I am inclined to answer that question in the negative. There is no provision, express or implied, in Exhibit 1, the contract agreement, leading to the inference that in the event of the Respondent's default in paying the sum contained in a certificate of payment within the stipulated time, it would be liable to pay interest on the

sum.

As the court below rightly pointed out at page 249 of the record, if the parties wished the payment of interest in the event of a default in making any payment a term of the contract, they would very easily have inserted such a provision in the contract. In the absence of any specific provision for the payment of interest in the contract agreement, the court cannot award interest. In the circumstances of this case awarding interest, as the trial court did, was an unwarranted interference with the sanctity of the contract and cannot therefore be allowed. The parties are bound by the clear provisions of the contract and the court is bound to give effect to same on sanctity of contract and the bindingness on the parties thereto.

On the whole, it is my view and I hold that the payment of interest, let alone 25% interest was not within the contemplation of the parties and it was therefore wrong for the trial court to grant same.

(p. 1700 G)

NOTABLE POINT OF INTEREST ***ONNOGHEN JSC***

1. Relevant facts must be pleaded

The principle relevant to the issue under consideration has been laid down in a number of cases thereby becoming settled law that a claim for pre-judgment interest may be made by a plaintiff as a right where it is either expressly provided for in or is contemplated by the agreement between the parties or under a mercantile custom, or under a principle of equity such as breach of fiduciary relationship. It follows that before a party can claim pre-judgment interest, he has to plead not only his entitlement to the interest but the basis of the entitlement either by statute or contract/agreement between the parties, or mercantile custom or principle of equity such as breach of fiduciary relationship. It is not for the court to speculate or conjecture or assume the facts relevant to the claim. The relevant facts must be pleaded, as facts not pleaded ground to no issue.

In addition to the requirement of pleading the relevant facts, the plaintiff must adduce evidence at the trial in proof of the relevant facts. Where there is no evidence in proof of the facts then the pleadings are deemed abandoned. (p. 1703 A)

REPRESENTATION

A. Deniyi with D. Otitoju, O. Atanda and R. Abdulraman for Appellant

P. Y. Garuba with N. A. Namtari for Respondent

B CASES REFERRED TO

Iveghor Vs Bazuaye (1979) 6 SCNJ 235 At 240

Gata Vs Paulosa (Nig) Ltd (1998) 3 NWLR (Part 543) 574 At 582

Adeyemi Vs Lan & Baker (Nig) Ltd (2000) 7 NWLR (Part 663) 33

C Allied Trading Co. Ltd vs G. B. N. Line (1985) 2 NWLR (part 5) 74

Irene Thomas v. Timothy O. Olufosoye (1986) 1 NWLR (pt.18) 669

Texaco Overseas Ltd Vs Pedmar (Nig) Ltd (2002) 7SCNJ 358 At 373

Ekwunife Vs Wayne (West Africa) Ltd (1989) 5NWLR (Part 122) 422

Union Bank of Nig. Ltd Vs Prof. A. O. Ozigi (1994) 3SCNJ 42 At 56

D F. Adesegun Katto Vs. Central Bank of Nig. (1991) 12SCNJ 1 at 15

Himma Merchants Vs Alh. I. Aliyu (1994) 6SCNJ (Pt. 1) 87 At 94

Xtoudus Services Nigeria Ltd & Anor Vs. Taisei (W.A) Ltd & Anor (2006) 6 SCNJ 300 At 316

Nigeria General Superintendence Co. Ltd Vs The Nigerian Ports Authority

E (1990) 1 NWLR (Part 129) 741

RULES REFERRED TO

Kaduna State High Court (Civil Procedure) Rules, O. 39 r. 7

F

LEAD JUDGMENT BY TABAI JSC

The Plaintiff was the Respondent at the Court below and the Appellant herein. The Defendant was the Appellant at the Court below and the Respondent herein. They would, in this judgment be simply referred to as the Appellant and the Respondent respectively.

Sometime in the year 1987, the parties entered into a contract under which the Appellant was to construct for the Respondent a Soap and Detergent factory as well as office Building at the Kudenda Industrial Layout, Kaduna at the contract sum of N3,854,938.10 (Three Million, Eight Hundred and Fifty Four Thousand Nine Hundred and Thirty Eight Naira, Ten Kobo). It was part of the agreement that the Respondent would pay to the Appellant such part of the contract sum raised in a certificate of payment issued by Architects appointed by the Respondent. It was also part of the agreement that

the sum stated in any certificate of payment fell due and payable within 21 days of the issuance of the certificate. The sum which became due for payment under the Respondent's Architects Certificate No. 18 dated 07/12/1989 was N449,474.45. The Respondent however failed to pay the aforesaid sum as agreed despite demands by the Appellant. B

In reaction, the Appellant took out a summons, claiming in paragraph 13 of its Amended Statement of Claim the following relief:

(a) The Plaintiff claims against the Defendant the sum of N449,474.45 (Four Hundred and Forty Nine Thousand, Four Hundred and Seventy Four Naira, Forty Five Kobo) only being the sum outstanding against the Defendant in favour of the Plaintiff on evaluation Certificate No. 18 issued by the Defendant's Architects on the 7th December, 1989; C D

(b) Interest on the outstanding sum herein above at the minimum rate of 25% per annum from the date of the default by the Defendant to effect payment according to contract i.e. from 29th day of December, 1989 till judgment in this suit;

(c) Interest at the rate of 10% per annum on the judgment debt from the date of judgment until the judgment is fully and finally settled by the Defendant. E

The Respondent as Defendant filed its Statement of Defence and Counter-Claim. Only one witness testified for the plaintiff's case. There was no evidence for the defence. In part of the judgment, the learned trial Judge at page 149 of the record spoke of consequential damages as follows: F

"The 4th consideration is as it relates to consequential damages. It is my considered opinion that the non-payment of the amounts due since 1989 has resulted in the loss of savings and profits that might have flowed therefrom. This fact I believe is reason enough for the Plaintiff to seek for interest on the said debt in default as consequential damages." G

In the concluding paragraphs of the said judgment, the learned trial Judge granted three reliefs the first two of which run as follows: H

"(i) The Defendant Henkel Chemicals Limited shall pay the Plaintiff A. G. Ferrero & Co. Limited the sum of N449,474.45k (Four Hundred and Forty Nine Thousand, Four Hundred and Seventy

Four Naira, Forty Five Kobo) only being the sum outstanding against the Defendant in favour of the plaintiff on valuation Certificate No. 18 issued by the Defendant's Architects on 7th December, 1999.

B *"2 Interest is awarded the Plaintiff against the Defendant on the outstanding sum here above at the rate of 25% per annum from December 29th, 1989 to today 16/06/2000."*

C The Respondent was aggrieved by the said judgment and thus proceeded on appeal to the Court below. In its judgment on the 20th of June, 2002, the appeal was allowed. The Court at page 255 of the record concluded:

C *"The appeal therefore succeeds and it is allowed. The award of pre-judgment interest of 25% on the judgment debt of N449,474.45 from 29th December, 1989 to the date of judgment which is 16th June, 2000 is without merit and is set aside."*

D The Appellant was aggrieved by the decision and has thus come on appeal to this court through its Notice of Appeal filed on the 15th of August, 2002. And the parties have, through their counsel, filed and exchanged their briefs of argument. The Appellant's brief dated the 10th of May, 2010 was prepared by Ademola Adeniji. It was filed E on the 11th of May 2010, but deemed properly file on the 2nd of June, 2010. The brief of the Respondent was prepared by P. Y. Garuba and was filed on the 27th of July, 2010.

In the Appellant's brief Mr. Ademola Adeniji formulated two issues which he couched as follows:

F *"1. Whether considering the pleadings and the evidence be- fore the trial court, particularly the unchallenged and uncontroverted testimony of the PW1 the court below could and should have ex- tended the scope of the doctrine of the equity beyond instances where G there exist fiduciary relationship between the parties and thus sustain or reduce the pre-judgment interest awarded by the trial court.*

2. Whether the Court of Appeal was not in error which has occasioned a miscarriage of justice when it suo motu raised and de- cided the issue of non-payment of filing fees for the claim and awarded H pre-judgment interest without calling on the parties before it, to ad- dress it on same."

In the Respondent's brief, however, P. Y. Garuba formulated a single issue which is:-

Whether the Court of Appeal was right in setting aside the trial

court's judgment awarding a pre-judgment interest rate of 25% per annum on the outstanding judgment sum of N449, 474.45 from December 29th, 1989 to June 16, 2000."

First of all, I want to say, with respect, that the Appellant's issue one is hardly comprehensible. In my view the single issue formulated by learned counsel for the Respondent adequately determines the appeal and I should therefore adopt it in its entirety. B

On this single issue the substance of the argument of learned counsel for the Appellant is as follows:- It was counsel's submission that although there is no provision for pre-judgment interest of 25% in the agreement Exhibit 1 and notwithstanding, the absence of any statutory provision, trade usage or custom or the existence of any Fiduciary relationship between the parties, the court below ought to have invoked the doctrine of equity to sustain the trial court's award of 25% pre-judgment interest on the authorities of ADEYEMI Vs LAN & BAKER (NIG) LTD (2000) 7 NWLR (part 663) 33, NIGERIA GENERAL SUPERITENDENCE CO. LTD Vs THE NIGERIAN PORTS AUTHORITY (1990) 1 NWLR (part 129) 741 and EKWUNIFE Vs WAYNE (WEST AFRICA) LTD (1989) 5 NWLR (part 122) 422. C D

Learned counsel referred to paragraph 13 (b) of the Amended Statement of Claim wherein the 25% interest is pleaded, the evidence of the PW1 at page 124 of the record and the fact that no evidence was led by the Respondent in support of its Statement of Defence and submitted that the trial court rightly acted on the unchallenged evidence of the Appellant on the interest claimed and awarded same. He relied once more on EKWUNIFE's case (supra). Learned counsel referred to the chequered history of the case i.e. the fact that this action was instituted nearly two years after the payment under certificate No.18 fell due and the fact that the action lasted about 9 years at the High Court before judgment and submitted that the award of the pre-judgment interest ought to be sustained. Learned counsel further relied on A. B. KEMP LIMITED Vs TOLLAND (1956) 2 Lloyd's List Law Report 681; HARBUTT'S PLASTICINE LIMITED Vs WAYNE TANK AND PUMP CORPORATION LIMITED (1970) 1 Q B. 447 at 468. Learned counsel urged finally that the appeal be allowed either by sustaining the 25% prejudgment interest or in the alternative reduces the percentage to what this Court considers appropriate. E F G H

On his Part, P. Y. Garuba, learned counsel for the Respondent, proffered the following arguments in the Respondent's brief. He referred to the contract agreement Exhibit 1 which, he argued, is the plank upon which the trial Court based its judgment and award of the 25% prejudgment interest. There is no provision therein for the payment of a retroactive monetary penalty by the Respondent in the event of a delayed payment. Learned counsel argued. It was counsel's further submission that the Appellant claimed only for the outstanding balance of N449,474.45 and that, he contended, was in tandem not only with the contract agreement but also with Order 39 Rule 7 of the Kaduna State High Court (Civil Procedure) Rules.

Learned counsel further pointed out that the claim for 25% interest per annum was only introduced in the Amended Statement of Claim and argued that the amended claim was in contradiction of the terms, language and spirit of Exhibit 1 by which terms alone the parties were bound. On the principles of interpretation of documents such as Exhibit 1, counsel referred to FORTUNE INTERNATIONAL BANK PLC VS. PEGASUS TRADING OFFICE (GMBH) & 2 OTHERS (2004) 1 SCNJ 292 at 303 and Section 132 (1) of the Evidence Act. It was further submitted that the claim of the 25% interest is not traceable to any custom cum mercantile usage and/or statute and was therefore merely speculate. Reliance was placed on HIMMA MERCHANTS LTD Vs ALHAJI INUWA ALIYU (1994) 6 SCNJ (part 1) 87 at 94, UNION BANK OF NIGERIA LTD Vs PROF. A. O. OZIGI (1994) 3 SCNJ 42 at 56. It was counsel's further submission that cases are decided on proof by admissible and credible evidence and that evidence though not challenged or controverted can still be disregarded for lack of substance. For this submission, learned counsel relied on FRANCIS ADESEGUN KATTO Vs CENTRAL BANK OF NIGERIA (1991) 12 SCNJ I at 15; NEKA BBB MANUFACTURING CO. LTD Vs A.C.B. LTD (2004) 1 SCNJ 193 at 212. Counsel further argued that a claim not proved by evidence but awarded by a trial court should be set aside by an appellate court. Counsel relied on XTOUDUS SERVICES NIGERIA LTD & ANOR Vs. TAISEI (WA) LTD & ANOR (2006) 6 SCNJ 300 at 316. It was further submitted that the cases of GATA Vs PAULOZA (NIG) LTD (1998) 3 NWLR (part 543) 574 at 582 and IVEGHOR Vs BAZUAYE (1979) 6 SCNJ 235 at 240 relied upon by the trial court to award the 25% pre-judgment

interest are totally at reliance with the instant case. He submitted further that interest claimed must be proved as one arising from the contract equity or mercantile custom. He relied on *TEXACO OVERSEAS LTD Vs PEDMAR (NIG) LTD* (2002) 7 SCNJ 358 at 373. The duty of a court, he argued, is to protect the contractual right of the parties in the agreed contract. He relied on *IREME THOMAS Vs. TIMOTHY OMOTAYO OLUFOSOYE* (1986) 1 NWLR (part 19) 669. In conclusion, learned counsel urged that the appeal be dismissed.

The facts of this case are not in dispute. The parties entered into a contract agreement some of which terms have already paraphrased above. It was part of the agreement that the sum contained in any certificate of payment issued by the Defendant/Respondent to the Plaintiff/Appellant fell due for payment within 21 days of the issuance of such certificate. It was however not a term in the agreement that in event of default of payment by the Respondent as stipulated it would be liable to pay, in addition 25% of the sum contained in the certificate issued by Architects appointed by it. The sum which fell due for payment as contained in the Respondent's Architects Certificate No. 18 was N449,474.45. The Respondent defaulted in paying the said sum as agreed. The Appellant has now sued in this action claiming, in addition 25% of the above stated sum in certificate No. 18. The trial court granted the claim including the 25% which it described as consequential damages. I have earlier in this judgment reproduced part of its reasoning and conclusion.

The Court below however, reversed the decision of the trial court on this issue of pre-judgment interest and set same aside. In its judgment, the court partly reasoned and concluded as follows:

"There is equally no material before the court to infer that compensatory award of interest on the claim outstanding beyond 21 days of receipt of valuation Certificate was within the contemplation of the parties. In the absence to the effect that in the event of a breach or default on the payment of valuation certificate, the defaulting party would be liable to interest on the outstanding sum, in any respectful view, the claim is not made out. As a party cannot unilaterally impose a term of contract on the other, the parties to the agreement must be ad idem on a term and condition of the contract before it becomes enforceable. The right to interest is equally not established without reference to a fiduciary relation, trade practice or

custom or mercantile usage or statute providing for such interest. There is therefore no justification for the award of interest on the judgment debt from 29th December, 1989 to the date of judgment on 16th June, 2000..." (See pages 252 -253 of the record).

On this same issue of pre-judgment interest, the court below
B concluded thus:-

"In the circumstances of this appeal, learned trial Judge wrongly awarded pre-judgment interest. I am encouraged in this view by the Supreme Court decision in the case of REUBEN N. A. EKWUNIFE
C Vs WAYNE (WEST AFRICA) LTD (1989) 5 NWLR (part 122) 422, 445 cited in the Respondent's brief that:-

*"Interest may be claimed as of right where it was contemplated by the agreement between the parties, or under a mercantile custom or under a principle of equity such as breach of Judiciary relation-
D ship"*

***The Court below referred to a number of other authorities. On this sole issue of pre-judgment interest, learned counsel for the parties cited a number of authorities including EKWUNIFE's case. I have read the authorities and there is no
E doubt that NIGERIAN GENERAL SUPERINTENDENCE CO. LTD Vs NIGERIA PORTS AUTHORITY (supra) and ADEYEMI Vs LAN & BAKER (NIG) LTD (supra) cited by the Appellant were decided on the principle that in purely commercial trans-
F actions, a party who holds on to the money of another for a long time without any justification and thus deprives that other of the use of such funds for the period should be liable to pay compensation by way of interests. NIGERIA GENERAL SUPERINTENDENCE CO. LTD Vs. NIGERIA PORTS AUTHOR-
G ITY (supra) went a step further to decide that even where interest is not claimed in the writ, the court can, in appropriate cases, award interest in the form of consequential order.***

***The question now is whether the principle in these cases adequately applies to the facts and circumstances of this case.
H The principle in the two cases pertains to normal commercial transactions without reference to any particular agreement, oral or documentary, in contradistinction to the instant case wherein the parties agreed to and are bound by a written contractual agreement. Can any of the parties be at liberty to read***

into such a written contract a term which is not embodied in it? I am inclined to answer that question in the negative. There is no provision, express or implied, in Exhibit 1, the contract agreement, leading to the inference that in the event of the Respondent's default in paying the sum contained in a certificate of payment within the stipulated time, it would be liable to pay interest on the sum. B

As the court below rightly pointed out at page 249 of the record, if the parties wished the payment of interest in the event of a default in making any payment a term of the contract, they would very easily have inserted such a provision in the contract. In the absence of any specific provision for the payment of interest in the contract agreement, the court cannot award interest. In the circumstances of this case awarding interest, as the trial court did, was an unwarranted interference with the sanctity of the contract and cannot therefore be allowed. The parties are bound by the clear provisions of the contract and the court is bound to give effect to same. On sanctity of contract and the bindingness on the parties thereto (see CHUKWUMAH Vs SHELL PETROLEUM DEV. CO. (1993) 4 NWLR (part 289) 512; UNION BANK OF NIGERIA Vs. PROF. ALBERT OJO OZIGI (1994) 3 NWLR (part 333) 385; ALLIED TRADING CO. LTD Vs G. B. N. LINE (1985) 2 NWLR (part 5) 74.) On the whole, it is my view and I hold that the payment of interest, let alone 25% interest was not within the contemplation of the parties and it was therefore wrong for the trial court to grant same. C D E F

In the circumstances, the court below was right to set same aside. The result is that, this appeal fails and it is accordingly dismissed. The judgment of the court below be and is hereby affirmed. G

I make no orders as to costs.

MUKHTAR JSC

I have read in advance the lead judgment delivered by my learned brother Tabai JSC. I am in full agreement that the appeal lacks merit and should be dismissed. There is no error in the decision of the lower court, and its order setting aside the pre-judgment interest of 25% on the judgment debt. I also dismiss the appeal. H

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Kaduna Division in appeal No. CA/K/277/2000 delivered on the 20th day of June, 2002 in which the court set aside the decision of the High Court of Kaduna State in Suit NO. KDH/KAD/254/91.

Appellant, as plaintiff had instituted the action originally under the undefended list procedure for the following reliefs:-

“(a) *N449,474.45 (Four Hundred and Forty-Nine Thousand, Four Hundred and Seventy-Four Naira, Forty-Five Kobo) only being the sum outstanding against the defendant in favour of the plaintiff on valuation certificate No.18 issued by the defendant’s architects on 7th December, 1989.*

(b) *Interest on the outstanding sum herein above at the minimum rate of 25% per annum from the date of the default by the defendant to effect payment according to contract i.e., from 29th day of December, 1989 till judgment in this suit.*

Interest at the rate of 10% per annum on the judgment debt from the date of judgment until the judgment debt is fully and finally settled by the defendant,”

The action was subsequently transferred to general cause list for hearing and determination following the filing of a notice of intention to defend.

The facts of the case have been fully stated in the lead judgment of my learned brother, TABAI, JSC and I do not intend to repeat them here except as may be needed to emphasis the point being made. In any event, the relevant facts are not in dispute between the parties, the issue in contention in this appeal being whether the lower court was right in setting aside the decision of the trial court awarding pre-judgment interest at the rate of 25% per annum in favour of the appellant on the debt of N449,474.45 from 29th December, 1989 to June 16th, 2000.

The relationship between the parties that gave rise to the action is contractual the same is regulated by Exhibit 1, the contract document. I had earlier in this judgment reproduced the reliefs claimed by the appellant relating to the claim of 25% pre-judgment interest on the sum outstanding.

It is settled law that parties are bound by the contract they

voluntarily enter into and cannot act outside the terms and conditions contained in the said contract.

The principle relevant to the issue under consideration has been laid down in a number of cases thereby becoming settled law that a claim for pre-judgment interest may be made by a plaintiff as a right where it is either expressly provided for in or is contemplated by the agreement between the parties or under a mercantile custom, or under a principle of equity such as breach of fiduciary relationship. It follows that before a party can claim pre-judgment interest, he has to plead not only his entitlement to the interest but the basis of the entitlement either by statute or contract/agreement between the parties, or mercantile custom or principle of equity such as breach of fiduciary relationship. It is not for the court to speculate or conjecture or assume the facts relevant to the claim. The relevant facts must be pleaded, as facts not pleaded ground to no issue.

In addition to the requirement of pleading the relevant facts, the plaintiff must adduce evidence at the trial in proof of the relevant facts. Where there is no evidence in proof of the facts then the pleadings are deemed abandoned.

In the instant case, learned counsel for the appellant admitted that the claim for pre-judgment interest is not based on Exhibit 1, the agreement between the parties, neither is it based on any statutory provisions nor trade nor custom nor established fiduciary relationship between the parties but that the lower court ought to have invoked the doctrine of equity to sustain the award by the trial court. I hold the considered view that the above submission is misconceived as principles of law and equity can only be applied to existing relevant facts of a case - not in vacuo.

In the instant case the relevant facts have neither been pleaded nor established in evidence so as to make it possible for a court of law to apply relevant principles of law and or equity thereto.

The situation being as stated supra, I hold the considered view that the trial court was in error when it granted the 25% interest on the debt claimed and that the lower court was correct in setting aside the said award, (see Himma Merchants Ltd vs Aliyu (1994) 6 SCNJ (Pt.1) 87 at 94; Union Bank of Nig. Ltd. vs. Ozigi (1994) 3 SCNJ 42 at 56.)

It is for the above reasons and the more further ones assigned

in the lead judgment of my learned brother, TABAI, JSC that I too dismiss the appeal for lack of merit.

I abide by all the consequential orders made in the said lead judgment including the order as to costs. Appeal dismissed.

B FABIYI JSC

This appeal is against the judgment of the Court of Appeal, Kaduna Division delivered on 20th June, 2002. Therein, the award of the pre-judgment interest of 25% on the judgment debt of N449,474.45 from 29th December, 1989 to the date of judgment by the trial High Court, to wit: 16th June, 2000 was set aside.

It is apt to state it at this point that pre-judgment interest is not contained in Exhibit 1 which is the agreement between the parties. Same was not contemplated by the parties. Indeed, Mr. Ugbabe, the sole witness for the appellant expressly admitted under cross-examination that ‘That matter of interest has nothing to do with the contract’.

In the appeal before this court, the serious issue in contention is:-

“Whether the Court of Appeal was right in setting aside the trial court’s judgment awarding a pre-judgment interest rate of 25% per annum on the outstanding judgment sum N449,474.45 from December 29, 1989 to June 16, 2000”.

Generally, interest is not payable on ordinary debt in the absence of a contract express or implied or mercantile usage or custom of the parties or as may be contained in statute. It may also be in place through fiduciary relationship between the parties. (See R.N.A. Ekwunife v. Wayne West-Africa Limited (1989) 5 NWLR (pt.122) 422, 455.)

In Himma Merchants Ltd V. Alhaji Inuwa Aliyu (1994) 6 SCNJ (PT.1) 87, this court per Onu, JSC in a similar situation pronounced as follows:-

“Where therefore there is no evidence whatsoever, as in the instant case, that the claim of interest is founded upon any rationale e.g. mercantile custom or trade usage known to the parties the claim of interest for 20% per month from July 1988, which antedates the judgment passed on 27th October, 1989 by the trial court is without foundation and ought to have been disallowed by the court below:..”

The same stance was also taken by this court in Union Bank of

Nigeria Ltd. v. Prof. A. O. Ozigi (1994) 3 SCNJ 42.

The above position of things clinches all arguments to the contrary as advanced on behalf of the appellant. This is more so as the appellant's witness under cross examination admitted 'that matter of interest has nothing to do with the contract. In effect, he asserted that interest was not within the contemplation of the parties herein. There is no modicum of evidence to buttress the appellant's claim. The trial court tried to justify the award of pre-judgment interest to no avail. It is the duty of a court to interpret the contract entered into by the parties as contemplated by them. See Irene Thomas v. Timothy O. Olufosoye (1986) 1 NWLR (pt.18) 669 cited on behalf of the respondent. It is very apt on the point.

The Court of Appeal was right in setting aside the undue pre-judgment interest awarded in favour of the appellant by the Trial court.

For the above reasons and the fuller ones set out in the judgment of my learned brother - Tabai JSC I too, hereby dismiss the appeal. I abide by all consequential orders therein contained; inclusive of that relating to costs.

RHODES-VIVOIR JSC

In 1987, the appellant and the respondent executed a contract. The appellant agreed to construct a soap and detergent factory for the respondent. The respondent agreed to pay N3.8m for the job. The parties agreed that payment would be in stages after a valuation certificate is issued by an Architect stating the amount due. A few of these certificates were issued and the respondent paid.

A valuation certificate for the sum of N449,474.45 was issued, but the respondent refused to pay, and so the appellant as plaintiff sued the respondent/defendant for:

(a) N449,474.45 being the sum outstanding against the defendant on valuation certificate.

(b) Interest on the outstanding sum at the minimum rate of 25% per annum from the date of default by the defendant. i.e. from 29/12/89 till judgment.

(c) Interest at the rate of 10% per annum on the judgment debt from the date of judgment until the judgment debt is fully paid. The learned trial Judge found in favour of the plaintiff/appellant. His

lordship ordered that:

1. The defendant Henkel Chemicals Ltd shall pay the plaintiff, A.G. Ferrero & Co. Ltd the sum of N449,474.45k being the outstanding against the defendant in favour of the plaintiff.

B 2. Interest is awarded the plaintiff against the defendant on the outstanding sum at the rate of 25% per annum from 29/12/89 to today 16/6/2000.

C 3. I shall however reserve ruling on prayer No. 3 on 10% interest claimed on the judgment debt from the date of this judgment until the mode of payment of the said judgment debt is determined by parties.

D Dissatisfied with the judgment the defendant/respondent lodged an appeal. The Court of Appeal held that the award of pre-judgment interest of 25% on the judgment debt of N449,474.45k from 29/12/89 to the date of judgment on 16/6/2000 is without merit. This is an appeal against that judgment. The award of 25% interest on the judgment is prejudgment interest, while the claim for 10% interest (not given by the learned trial Judge) is post judgment interest. As quite rightly pointed out by the Court of Appeal before interest can be E recoverable on an ordinary debt at common Law, there must be in place.

(a) Contract express or implied; or

(b) Some mercantile usage;

F (c) Statute such as the judgment Act of 1838 and Section 9 and 57 of the Bill of Exchange Act Cap 35 of the Laws of the Federation of Nigeria, 1990. See *Re Anglesey* (1901) 2 ch pg.548 London, *Catham and Dover Railways v. South-Eastern Railway* 1893 AC pg.434, *Ekwunife v. Wayne (West Africa) Ltd* (1989) 5 NWLR pt.122 pg. G 422.

The learned trial Judge was wrong to award pre-judgment interest since it was never in the contemplation of the parties by the clear terms of the agreement, neither can the principles of equity be stretched to accommodate it.

H For this and the fuller reasoning in the leading judgment delivered by Tabai JSC which I was privileged to read in draft, I would dismiss the appeal. The judgment of the Court of Appeal is hereby confirmed.